Barry Law Review

Volume 13
Issue 1 *Fall 2009*

Article 4

2009

Goodbye Forfeiture, Hello Waiver: The Effect of Giles v. California

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GOODBYE FORFEITURE, HELLO WAIVER: THE EFFECT OF *GILES V. CALIFORNIA*

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I. INTRODUCTION

Dwayne killed Brenda;[1] as a result, Brenda could not testify at the subsequent trial. It had become common practice for courts to apply the doctrine of forfeiture by wrongdoing as an equitable principle in cases such as this, in which a defendant's actions caused a victim to be unavailable to testify.[2] In 2008, the Supreme Court decided *Giles v. California*[3] and altered that exercise of the forfeiture doc-

* J.D., Gonzaga University School of Law, May 2009. Special thanks to Professor Rosanna Peterson for her guidance, critical eye, and encouraging words, and to my family and Estee Lewis for their support. You can contact the author at msmith@lawschool.gonzaga.edu.

1. *See infra* notes 11, 16 and accompanying text.
2. *See infra* notes 34-37, 41-42, 126-29 and accompanying text.
3. Giles v. California, 128 S. Ct. 2678 (2008) [hereinafter *Giles 3*].

trine. The Court added a requirement that a defendant must actually intend to prevent a witness from testifying in order for forfeiture by wrongdoing to apply.[4]

This article begins with a presentation of the *Giles* case in Part II. Part III provides an historical understanding of the confrontation right and forfeiture by wrongdoing under the Constitution, common law, and Federal Rules of Evidence. Finally, through an examination of waiver requirements for other confrontation rights, Part IV demonstrates that the Court's addition of an intent element has turned the forfeiture doctrine into a waiver of the confrontation right by misconduct.

II. *GILES V. CALIFORNIA*

A. Facts

"If I catch you fucking around I'll kill you," Dwayne Giles said to Brenda Avie while pointing a knife at her.[5] This was the end of an argument between the couple, which began when Giles accused Avie of having an affair.[6] Giles grabbed Avie, lifted her up, and started to choke her.[7] Avie was able to break free, but fell to the floor, and Giles began punching her before pulling out the knife.[8] The police responded to the domestic disturbance, and Officer Stephen Kotsinadelis took Avie's statement.[9]

Three weeks later,[10] Avie lay bleeding and dying on the ground with Giles standing over her holding a gun.[11] She had been shot six times.[12]

There were no witnesses to the shooting, but Giles' niece was inside the house and heard what happened.[13] She heard the couple engaged in a normal conversa-

4. *See infra* notes 46-47 and accompanying text.
5. People v. Giles, 19 Cal. Rptr. 3d 843, 846 (Cal. Ct. App. 2004) [hereinafter *Giles 1*].
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. There is a slight discrepancy as to the date of the domestic disturbance. The appellate court lists the date of the domestic disturbance as September 5, 2001, and the date of the shooting as September 29, 2002. *Id.* However, the date of the domestic disturbance is consistently listed as "weeks" prior to the shooting. *See Giles 3*, 128 S. Ct. at 2681 ("about three weeks before the shooting"); People v. Giles, 152 P.3d 433, 436 (Cal. 2007) [hereinafter *Giles 2*] ("[a] few weeks before the shooting" and also listing the date as September 5, 2002); *Giles 1*, 19 Cal. Rptr. 3d at 846 ("[a] few weeks before the shooting"); *see also* Brief of Petitioner at *3, Giles v. California, 128 S. Ct. 2678 (2008) (No. 07-6053) (listing the date as September 5, 2002). Thus, the author infers that the appellate court's citing of the year as 2001 was a typographical error.
11. *Giles 1*, 19 Cal. Rptr. 3d at 845.
12. *Id.*

> Two of those wounds were fatal; one was consistent with her holding up her hand at the time she was shot; one was consistent with her having turned to her side when she was shot; and one was consistent with the shot being fired while she was lying on the ground.

Id.
13. *Giles 3*, 128 S. Ct. at 2681.

tion, but then heard Avie yell "Granny" repeatedly and a series of gunshots.[14] Giles left the scene of the crime and was apprehended two weeks later.[15]

B. Procedural History

1. Trial

At trial, Giles testified to shooting Avie, but claimed his actions were in self-defense.[16] He said that Avie shot another man before their relationship, that she threatened others with a knife, and that she previously vandalized his property.[17] According to Giles, prior to the shooting, Avie called him and threatened to kill his new girlfriend.[18] She then showed up at the house and told Giles she was going to kill both him and his new girlfriend, so Giles retrieved his gun.[19] He then claimed Avie "charged" him, and he shot her in response because he feared that she had a weapon in her hand.[20] However, Avie did not have a weapon.[21]

During trial, in order to establish a propensity for domestic violence by Giles,[22] the prosecution offered evidence of the earlier domestic disturbance between Giles and Avie.[23] Officer Kotsinadelis testified about his response to the call, including statements made by Avie.[24] The defense objected to the statements, based on hearsay.[25] The trial court ruled Avie's statements were admissible under a hearsay exception allowing trustworthy out-of-court statements about the infliction of physical injury on an unavailable declarant.[26] The jury found Giles guilty of first degree murder,[27] and "[he] was sentenced to prison for a term of 50 years to life."[28]

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14. *Giles 1*, 19 Cal. Rptr. 3d at 845. The shooting took place at Giles' grandmother's house. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 845-46.
20. *Id.*
21. *Id.* at 845.
22. *See* CAL. EVID. CODE § 1109 (West Supp. 2009) (amended 2004 and 2005).
23. *Giles 1*, 19 Cal. Rptr. 3d at 846. This was done in order "[t]o rebut [Giles'] claim of self-defense and impeach his testimony . . . ." *Giles 3*, 128 S. Ct. at 2695.
24. *Giles 1*, 19 Cal. Rptr. 3d at 846.
25. *Id.*
26. *Id.* *See* CAL. EVID. CODE § 1370(a) (West Supp. 2009), which provides in pertinent part:

> Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. (2) The declarant is unavailable as a witness pursuant to Section 240. (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . (4) The statement was made under circumstances that would indicate its trustworthiness. (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

CAL. EVID. CODE § 1370(a).

27. *Giles 2*, 152 P.3d at 437. *See* CAL. PENAL CODE § 187(a) (West 2008); CAL. PENAL CODE § 189 (West 2008) (amended 2002) (California's first degree murder statutes). The jury also found Giles "personally dis-

2. California Court of Appeals

On appeal, Giles contended that the admission of Avie's statements to Officer Kotsinadelis violated his Sixth Amendment right to confront witnesses.[29] He claimed that the statements were testimonial under *Crawford v. Washington*[30] and should have been excluded.[31] Giles argued "that a defendant forfeits a Confrontation Clause objection through wrongdoing only when he is charged with or is under investigation for a crime, and wrongfully procures the witness's absence from trial with the intent of preventing testimony about that crime."[32] Giles further argued that applying the forfeiture doctrine in cases where the defendant is on trial for homicide of the victim witness, such as his own, would require the trial court to determine that the defendant is guilty before admitting victim hearsay evidence.[33]

The appellate court held that Giles forfeited his Confrontation Clause objection to Avie's statements by killing her.[34] It classified the doctrine of forfeiture by wrongdoing as an historical, equitable principle disallowing a defendant to benefit from wrongfully procuring a witness's absence.[35] The court refused to limit the doctrine only to defendants with intent, at the time of the crime, to prevent a witness from testifying against him.[36] In sum, "forfeiture by wrongdoing is both amply supported by the record and equitable under the circumstances. [Giles] cannot be heard to complain that he was unable to cross-examine Avie about her prior,

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charged a firearm causing great bodily injury or death." *Giles 2*, 152 P.3d at 437. *See* CAL. PENAL CODE § 12022.53(d) (West 2000) (amended 2001, 2002, 2003, and 2006).

28. *Giles 1*, 19 Cal. Rptr. 3d at 844.

29. *Id.* at 845. Giles' secondary appellate argument was that the evidence did not establish the premeditation and deliberation necessary for first degree murder, and his conviction should be reduced to second degree murder. *Id.* The court of appeals found that the evidence "was more than adequate" for his first degree murder conviction. *Id.* at 852.

30. Crawford v. Washington, 541 U.S. 36 (2004). The *Crawford* decision was issued after Giles' trial. *Giles 1*, 19 Cal. Rptr. 3d at 846.

31. *Id.* at 846-47. It was accepted by all of the reviewing courts that Avie's statements to Officer Kotsinadelis during the domestic disturbance were testimonial in nature, without any court undergoing such an analysis. *See Giles 3*, 128 S. Ct. at 2682; *Giles 2*, 152 P.3d at 438; *Giles 1*, 19 Cal. Rptr. 3d at 847. On remand, the appellate court determined that "Avie's statements were testimonial because they were made in response to a focused police interview aimed at establishing the circumstances of a crime." People v. Giles, No. B166937, 2009 WL 457832, at *1 (Cal. Ct. App. Feb. 25, 2009) [hereinafter *Giles 4*].

32. *Giles 1*, 19 Cal. Rptr. 3d at 848.

33. *Id.* at 849. The appellate court found that making a determination on the admissibility of homicide victim hearsay evidence does not present procedural problems for trial courts. *Id.* "A court is not precluded from determining the preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate issue in the case." *Id.* As with other hearsay evidence, the court would make a decision based on preliminary facts. *Id.* "This ruling will not infringe in any way upon the ultimate question for the jury's resolution-whether the defendant is guilty beyond a reasonable doubt of the homicide as charged." *Id.*

34. *Id.* at 850. The appellate court explicitly stated it was a narrow holding with four limitations: 1) hearsay statements by unavailable witnesses are not automatically admissible, but must fit under an exception; 2) the criminal act making the witness unavailable must have been intentional rather than incidental; 3) forfeiture by wrongdoing can only apply if equitable, and not if it would be unjust; and 4) victim homicide hearsay evidence is to be admitted without informing the jury of any particular findings by the court. *Id.* at 850-51.

35. *Id.* at 847-48.

36. *Id.* at 848 (citing United States v. Emergy, 186 F.3d 921, 926 (8th Cir. 1999); United States v. Miller, 116 F.3d 641, 667-68 (2d Cir. 1997); State v. Meeks, 88 P.3d 789, 794 (Kan. 2004); People v. Moore, 117 P.3d 1, 2-3 (Colo. Ct. App. 2004)).

trustworthy statements to law enforcement when it was his own criminal violence that made her unavailable for cross-examination."[37]

3. California Supreme Court

The Supreme Court of California granted review regarding application of the forfeiture by wrongdoing doctrine[38] and affirmed the court of appeals.[39] The court found that it was proper for post-*Crawford* courts to apply the forfeiture by wrongdoing doctrine as an equitable principle, "allowing fact finders access to relevant evidence that the defendant caused not to be available through live testimony."[40] Regarding Giles, the court opined that he "should not be able to take advantage of his own wrong by using the victim's statements to bolster his self-defense theory, while capitalizing on her unavailability and asserting his confrontation rights to prevent the prosecution from using her conflicting statements."[41] The court determined that Giles forfeited his right to confront Avie's statements by wrongdoing when he caused her unavailability to testify through an unlawful homicide.[42]

C. Majority Opinion

The Supreme Court of the United States granted certiorari[43] in order to determine "whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial."[44] Although this was the initial framing, the Court then narrowed the issue to whether such an understanding of the forfeiture by wrongdoing doctrine is an exception to the confrontation right established at the founding, as required by *Crawford*.[45] The Supreme Court held that at the founding, and historically thereafter, forfeiture by wrongdoing was only applied when there was intent to prevent a witness from testifying.[46] As expressed by the California Court of Appeals, "[Giles] did not forfeit his right to confront [Avie's] statement unless he killed her with the intent to prevent her from testifying."[47] The

37. *Giles 1*, 19 Cal. Rptr. 3d at 851.

38. People v. Giles, 102 P.3d 930 (Cal. 2004). It limited the issues to 1) more specifically, application of forfeiture by wrongdoing in the Giles case; and 2) more broadly, whether the forfeiture by wrongdoing doctrine applies when the wrongdoing that makes the witness unavailable to testify is the same as the criminal offense. *Id.*

39. *Giles 2*, 152 P.3d at 447.

40. *Id.* at 444.

41. *Id.*

42. *Id.* at 447. The Court found that "independent evidence, considered with the victim's prior statements, support[ed] the Court of Appeal's conclusion . . . ." *Id.*

43. Giles v. California, 128 S. Ct. 976 (2008).

44. *Giles 3*, 128 S. Ct. at 2681.

45. *Id.* at 2682. By narrowing the issue in this way, the majority relied mostly on pre-*Reynolds* cases; whereas, the California Supreme Court examined American precedent by focusing on post-*Reynolds* cases. *See infra* notes 56-72 and accompanying text (majority's use of cases); *Giles 2*, 152 P.3d at 438-42 (California Supreme Court's use of cases).

46. *Giles 3*, 128 S. Ct. at 2684, 2687, 2693.

47. *Giles 4*, at *1 (statement of the Supreme Court's holding by the California Court of Appeals on remand).

Supreme Court vacated the decision of the California Supreme Court and remanded the case.[48]

The majority[49] used three main avenues to support its interpretation of forfeiture by wrongdoing: 1) plain reading of the language, 2) analysis of common law cases, and 3) analysis of subsequent cases.[50]

The analysis began with an examination of forfeiture by wrongdoing as defined and understood at common law.[51] Based on *Lord Morley's Case* in 1666, "forfeiture by wrongdoing[] permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[52] The majority interpreted the terms in that definition as "suggest[ing] that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying"[53] and determined "that a purpose-based definition of these terms governed."[54] However, the majority also admitted that under some definitions, all cases where a defendant caused the unavailability of the witness could be included.[55]

Next, the majority studied cases that applied the doctrine at the time of the founding.[56] In its examination of common law cases, the majority found an "absence of . . . admitting prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying" and the "uniform exclusion of unconfronted inculpatory testimony by murder victims."[57] The majority determined that at the founding it was "plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying."[58] In the two main cases espoused by the majority, both courts refused to admit the homicide victims' statements because they had not been confronted by the defendant, and the statements were not considered dying declarations.[59] The Court also used these cases to show that the prosecutors did not argue, nor did the courts consider on their own, admitting the statements because the defendants had made the witnesses unavailable through murder.[60]

The analysis continued with an examination of cases since the founding.[61] The majority reviewed the seminal American case for forfeiture by wrongdoing,[62] *Rey-*

48. *Giles 3*, 128 S. Ct. at 2693.

49. Justice Scalia authored the opinion of the Court, except for one section. *Id.* at 2680. Chief Justice Roberts and Justices Thomas and Alito joined in full. *Id.* Justices Souter and Ginsburg joined to all but one section, Part II-D-2. *Id.*

50. *Id.* at 2688.

51. *Id.* at 2682-84.

52. *Id.* at 2683.

53. *Id.*

54. *Id.* at 2683-84.

55. *Giles 3*, 128 S. Ct. at 2683. The word "procurement" could "merely require that a defendant have caused the witness's absence . . . ." *Id.* The word "means" may "sweep in all cases in which a defendant caused a witness to fail to appear . . . ." *Id.*

56. *Id.* at 2684-86.

57. *Id.* at 2688.

58. *Id.* at 2684.

59. *Id.* at 2684-85 (citing King v. Woodcock, (1789) 168 Eng. Rep. 352 (K.B.); King v. Dingler, (1791) 168 Eng. Rep. 383 (K.B.)). *See infra* notes 117-19 and accompanying text.

60. *Giles 3,* 128 S. Ct. at 2685-86.

61. *Id.* at 2687-88.

nolds v. United States.[63] In *Reynolds*, the defendant was on trial for bigamy.[64] When presented with a subpoena for his alleged second wife, he refused to disclose her whereabouts.[65] When she did not appear to testify, her testimony from a previous trial was read into evidence.[66] On appeal, the defendant argued that her previous testimony should not have been admitted because it violated his confrontation right.[67] The *Reynolds* Court did not find an error,[68] stating that "[The Constitution] grants [a defendant] the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege."[69] Although admitting *Reynolds* was based on broad equitable principles, the majority applied a narrow analysis and concluded that the *Reynolds* Court adopted a forfeiture doctrine that only included conduct by the defendant intending to prevent the testimony of a witness.[70]

From the *Reynolds* case in 1878 until 1985, courts only applied the forfeiture by wrongdoing doctrine to witness tampering.[71] This narrow doctrine was codified in the Federal Rules of Evidence in 1997.[72]

The majority spent the rest of its argument responding to the dissent.[73] Notably, it did acknowledge that in the context of domestic violence, prior statements of an abused homicide victim may be allowed under forfeiture by wrongdoing, if there was "intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution" when the prior statements were made.[74] Essentially, the majority allowed for forfeiture by wrongdoing to

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62. *Id.* at 2687.
63. Reynolds v. United States, 98 U.S. 145 (1878).
64. *Id.* at 146.
65. *Id.* at 148-50.
66. *Id.* at 151-52.
67. *Id.*
68. *Id.* at 160.
69. *Id.* at 158. The Court further found that the defendant was present in court and had the opportunity to defend against the accusation that he had kept the witness from the trial. *Id.* at 160.
70. *Giles 3,* 128 S. Ct. at 2687. The majority argued that if the doctrine of forfeiture by wrongdoing applied beyond intent to prevent witness testimony, "one would have expected it to be routinely invoked in murder prosecutions . . . in which the victim's prior statements inculpated the defendant." *Id.*
71. *Id.* In 1985, the Eleventh Circuit found that a defendant lost his confrontation right when he murdered the witness. United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985).

> Rouco waived his right to cross-examine Benitez by killing him. "The Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery." We have previously stated that:
>
> > The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution "would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause," … and make a mockery of the system of justice that the right was designed to protect.

Id. (citations omitted).
72. *Giles 3,* 128 S. Ct. at 2687 (citing Davis v. Washington, 547 U.S. 813, 833 (2006)); *see* FED. R. EVID. 804(b)(6).
73. *Giles 3,* 128 S. Ct. at 2688-93.
74. *Id.* at 2693. "Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." *Id.*

relate back to the time of domestic violence, if there was intent at that time to prevent the victim from "testifying."[75]

D. Concurring and Dissenting Opinions

1. Concurring: Justices Thomas and Alito

Justices Thomas and Alito each wrote separate opinions pointing out that Avie's statements did not trigger the Confrontation Clause.[76] Referring back to his concurring opinion in *Davis v. Washington*,[77] Justice Thomas thought that Avie's statements did not implicate the Confrontation Clause because they were informal, and thus non-testimonial.[78] Similarly, Justice Alito felt "the real problem concern[ed] the scope of the confrontation right," in that it only applies to out-of-court statements that are parallel to those made by witnesses at trial.[79] Each noted that the challenge was not preserved as an issue on appeal, and consequently their concern was not before the Court.[80] If Avie's statements did trigger the Confrontation Clause, then both ultimately concurred in the judgment.[81]

2. Concurring in Part: Justice Souter

Justice Souter, with whom Justice Ginsburg joined, wrote a concurrence joining all but one part of the majority's opinion.[82] He expressed that a showing of intent to prevent a witness from testifying satisfies equity, when the alternative result would be circular reasoning.[83]

If the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence [of the declarant]; evidence that the defendant killed would come in because the defendant probably killed [the declarant].[84]

He further supported the majority's conclusion regarding the domestic violence context.[85] Intent could be inferred from a typical domestic violence relationship because the abuser separates the victim from others, including avenues from which

75. *Id.* For discussions on the forfeiture doctrine in the context of domestic violence, *see* Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases*, 44 IDAHO L. REV. 643 (2008); Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441 (2006); Myrna S. Raeder, *Domestic Violence Cases After* Davis*: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL'Y 759 (2007).

76. *Giles 3*, 128 S. Ct. at 2693-94 (Thomas, J., concurring; Alito, J., concurring).

77. Davis v. Washington, 547 U.S. 813, 840 (2006) (Thomas, J., concurring).

78. *Giles 3,* 128 S. Ct. at 2693-94 (Thomas, J., concurring).

79. *Id.* at 2694 (Alito, J., concurring).

80. *Id.* at 2693-94 (Thomas, J., concurring; Alito, J., concurring).

81. *Id.* at 2694.

82. *Id.* at 2694 (Souter, J., concurring in part).

83. *Id.*

84. *Id.*

85. *Giles 3*, 128 S. Ct. at 2695.

she could get help.[86] "If the evidence for admissibility shows a continuing relationship of [domestic violence], it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger."[87]

3. Dissenting: Justice Breyer

Justice Breyer, joined by Justices Stevens and Kennedy, drafted the dissenting opinion.[88] According to the dissent, Giles forfeited his confrontation right by killing Avie.[89]

Breyer distinguished between the word "intent" and the terms "purpose" or "motive."[90] He argued that the majority would only apply the doctrine of forfeiture by wrongdoing when a defendant purposely intended to prevent the witness from testifying.[91] Conversely, Justice Breyer would apply forfeiture by wrongdoing when a defendant's actions resulted in the witness being unable to testify, regardless of whether the defendant had the particular purpose of keeping the victim from testifying.[92]

He also advocated for state rights.[93] A broad reading of the forfeiture by wrongdoing doctrine does not demand admission of all prior testimonial statements.[94] Rather, "[s]tate hearsay rules remain in place; and those rules will determine when, whether, and how evidence of the kind at issue here will come into evidence."[95]

His underlying concern was that the majority's rule, requiring a showing of purpose, "grants the defendant not fair treatment, but a windfall" in domestic violence cases where victims are commonly hesitant or unavailable to testify.[96] Under the dissent's opinion, a defendant could forfeit his confrontation right through threats, by murdering the witness, or by a showing of domestic violence.[97]

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86. *Id.*
87. *Id.*
88. *Id.* (Breyer, J., dissenting).
89. *Id.*

> What important constitutional interest is served, say, where a prior testimonial statement of a victim of abuse is at issue, by a constitutional rule that lets that evidence in if the defendant killed a victim *purposely* to stop her from testifying, but keeps it out if the defendant killed her *knowing* she could no longer testify while acting out of anger or revenge?

Id. at 2708.

90. *Id.* at 2697-99.
91. *Id.* at 2698. In criminal law, intent can be presumed from actions because it is presumed a person knows the consequence of her actions. *Id.* In the context of forfeiture by wrongdoing, Breyer sees the majority moving from this concept of presumed intent to requiring a defendant to have the particular purpose or motive of keeping a witness from testifying. *Id.*
92. *See Giles 3*, 128 S. Ct. at 2698-99.
93. *See id.* at 2700. "The majority's rule, which requires exclusion, would deprive the States of this freedom and flexibility [in applying their evidentiary rules]." *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 2709.
97. *Id.* at 2708-09.

E. On Remand

On remand, "[the California] Supreme Court transferred the cause back to [the Court of Appeal] with directions to vacate [the] previous decision and to resolve any remaining issues in light of *Giles v. California*."[98] The appellate court reversed its earlier decision, holding that Giles' confrontation right had been violated when Avie's statements were admitted because "[t]he prosecution did not establish that [Giles] procured [Avie's] absence with the intent to prevent her from testifying."[99] Assumedly, the next step is for Giles to be retried.[100]

III. HISTORICAL OVERVIEW OF THE RIGHT TO CONFRONT WITNESSES & FORFEITURE BY WRONGDOING

As displayed in the procedural history of this case, an understanding of forfeiture by wrongdoing is dependent on an historical examination of the doctrine.[101] The outcome further depends on the time span of cases that are examined, theories of constitutional interpretation applied, and rules of evidence created. This section provides a brief overview of the confrontation right and doctrine of forfeiture by wrongdoing under the Constitution, common law, and rules of evidence.

A. Constitution

The Sixth Amendment to the United States Constitution contains the Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[102] The confrontation right involves two parts: 1) testimony of witnesses under oath, and 2) cross-examination of those witnesses.[103] The aspiration of the confrontation right, and especially cross-examination, is to discover the truth.[104] The reliability of evidence is secured "by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[105]

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98. *Giles 4*, at *1.

99. *Id.* at *3-4. The appellate court found that it was not harmless error because "a reasonable doubt exists whether the admission of Avie's statements contributed to the jury's verdict." *Id.* at *4-5.

100. The appellate court provided guidance to the trial court for retrial. Avie's statement may be determined non-testimonial if a foundational showing is made of a contemporaneous emergency. *Id.* at *3-4. Avie's statements may still be admissible under forfeiture by wrongdoing if it is established that Giles' intent was to prevent Avie from testifying. *Id.* at *4. And, there was sufficient evidence of premeditation and deliberation to convict Giles of first degree murder. *Id.* at *5-6.

101. *See supra* Parts II.B.2-D.3.

102. U.S. CONST. amend. VI.

103. Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales From the Crypt: An Examination of Forfeiture by Misconduct and Its Applicability to the Texas Legal System*, 31 ST. MARY'S L.J. 99, 103-04 (1999).

104. *Id.* at 104. "[C]ross-examination is 'the greatest legal engine ever invented for the discovery of the truth.'" *Id.* (quoting 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1367, at 32 (1974)).

105. James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 527 (2003) (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990)).

For twenty-four years, under *Ohio v. Roberts*,[106] sufficiently reliable out-of-court statements were admissible under the Confrontation Clause.[107] Such statements were deemed sufficiently reliable if they "[fell] within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[108]

Then in *Crawford*, the Supreme Court determined that "testimonial" out-of-court statements were inadmissible under the Confrontation Clause unless the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant.[109] "Holding that hearsay rules and judicial determinations of reliability no longer satisfied a defendant's confrontation right, *Crawford* announced: 'Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.'"[110]

Despite this dramatic change, the *Crawford* court explicitly allowed an exception for the doctrine of forfeiture by wrongdoing as an equitable principle. "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . ."[111] This was reaffirmed in *Davis*: "We reiterate what we said in *Crawford* . . . . [O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."[112]

Proponents of a broad reading of the forfeiture by wrongdoing doctrine would argue that the "Confrontation Clause does not remedy self-created confrontation problems. . . . When the defendant causes the loss of the witness that makes confrontation impossible, the Sixth Amendment has no role."[113] On the other hand, defendants' rights advocates may argue that such a broad forfeiture doctrine is contrary to the presumption of innocence and strips defendants of a basic constitutional right prior to trial.[114]

B. Common Law

Similar to other hearsay exceptions, the forfeiture by wrongdoing doctrine was "ultimately incorporated from English common law, which serves as the foundation for the American legal system."[115] This section provides a limited chronological overview of historical case law regarding forfeiture by wrongdoing, and begins

106. Ohio v. Roberts, 448 U.S. 56 (1980).
107. *Id.* at 66.
108. *Id.*
109. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). For more on *Crawford* and its implications, see James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel By Wrongdoing:* Davis v. Washington *and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & POL'Y 863 (2007); Aaron R. Petty, *Proving Forfeiture and Bootstrapping Testimony After* Crawford, 43 WILLAMETTE L. REV. 593 (2007); Robert M. Pitler, Crawford *and Beyond: Revisited in Dialogue*, 15 J.L. & POL'Y 333 (2007).
110. *Giles 2*, 152 P.3d at 437 (quoting *Crawford*, 541 U.S. at 69-70).
111. *Crawford*, 541 U.S. at 62.
112. Davis v. Washington, 547 U.S. 813, 833 (2006).
113. *See* Flanagan, *supra* note 105, at 526.
114. *Id.* at 527-28.
115. Valdez & Dahlberg, *supra* note 103, at 134-35.

with a response to the majority's limitation of the doctrine to the time of the founding.

The *Giles* majority recognized that the forfeiture by wrongdoing doctrine existed at the founding; however, they were determined to limit today's application to that founding-era understanding.[116] Their determination to disregard the slow evolution of the law over time is troubling considering the legal status of women at that time. Historically, women were treated as and considered property of men.[117] "[W]omen's testimony [under the common law] was banned in courts of law or subject to limitations not imposed on men's testimony on the theory that women's testimony was unreliable."[118] Both of the majority's supportive cases involved men killing their wives, one in 1789 and the other in 1791, and the women making statements to that effect after the violent act but before their deaths.[119] Possible underlying reasons for not allowing the wives' statements were that women were considered property of their husbands and unreliable by virtue of their gender. The majority's determination to limit the doctrine of forfeiture by wrongdoing to only the founding-era's common law understanding is not persuasive because it propagates reliance on an antiquated view of women.

The first significant American case to apply the forfeiture by wrongdoing doctrine, *Reynolds*, took place in 1878.[120] The focus was on whether the witness' absence was caused by the defendant, not on the intent behind his wrongful conduct.[121] "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. . . . [I]f he voluntarily keeps the witnesses away, he cannot insist on his [confrontation] privilege."[122] The Court also propounded the equitable philosophy behind the forfeiture doctrine: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . ."[123]

The forfeiture by wrongdoing doctrine kept a low profile for nearly 100 years until "the lower federal courts began applying the forfeiture rule extensively in the context of witness tampering cases."[124] In these cases, in an attempt to prevent a

116. *Giles 3*, 128 S. Ct. at 2682, 2864-86. *See supra* notes 56-59, and accompanying text.

117. Deana Pollard Sacks, *Elements of Liberty*, 61 SMU L. REV. 1557, 1577 (2008). As applied in the context of rape: "The word 'rape' originates from the ancient Roman term 'raptus,' which meant an act that 'was not a public crime but rather a private wrong against the man who had legal power over the woman or property violently seized by the raptor.'" Caia Johnson, Note, *Traumatic Amnesia in the New Millennium: A New Approach to Exhumed Memories of Childhood Sexual Abuse*, 21 HAMLINE J. PUB. L. & POL'Y 387, 401 n.73 (2007) (quoting JAMES A. BRUNDAGE, SEX, LAW AND MARRIAGE IN THE MIDDLE AGES 63 (1993)).

118. Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN'S L.J. 99, 113 (1997).

119. *See supra* note 59 and accompanying text.

120. *See supra* notes 62-70 and accompanying text. *Reynolds* relied on *Lord Morley's Case* from the English common law, and cases thereafter. Reynolds v. United States, 98 U.S. 145, 158-59 (1878).

121. *Id.* at 158-61. "Notably . . . the court did not suggest that the rule's applicability hinged on [the defendant's] purpose or motivation in committing the wrongful act." *Giles 2*, 152 P.3d at 438.

122. *Reynolds*, 98 U.S. at 158.

123. *Id.* at 159.

124. *Giles 2*, 152 P.3d at 439.

witness from testifying against him, a defendant would procure the witness' absence.[125]

The *Crawford* decision was a turning point; "[a]fter *Crawford*, the response of many courts . . . was to focus on the equitable forfeiture rationale which could eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases."[126] Courts applied the forfeiture by wrongdoing doctrine to cases in which the homicide victim made statements about the violent crime itself,[127] and regarding prior statements by the homicide victim.[128] "Significantly, the courts in these cases applied the forfeiture by wrongdoing doctrine although there was no indication the defendants killed the victims with the intent of preventing testimony at a future trial."[129]

The post-*Crawford* cases resulted in a split as to whether the forfeiture by wrongdoing doctrine required intent to prevent testimony:

> Some state and federal courts have stated that the intent-to-silence requirement is only mandated by the federal rules and not by the Constitution. . . . Other courts have stated that the intent-to-silence requirement is an element of their forfeiture by wrongdoing doctrines, although stopping short of holding that the intent requirement is constitutionally compelled.[130]

C. Rules of Evidence

The forfeiture by wrongdoing doctrine was codified in the Federal Rules of Evidence as a hearsay exception in 1997.[131] Rule 804(b)(6) states in pertinent part:

> Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (6) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended

125. *Id.* "As with the federal courts, the state courts generally applied the [forfeiture by wrongdoing] rule when the defendant intended to, and did, tamper with an actual or potential witness to prevent the witness from cooperating with the authorities or testifying at trial." *Id.* at 440.

126. *Id.*

127. *See, e.g.*, State v. Meeks, 88 P.3d 789 (Kan. 2004); United States v. Mayhew, 380 F. Supp. 2d 961 (S.D. Ohio 2005).

128. *See, e.g.*, United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005); People v. Moore, 117 P.3d 1 (Colo. Ct. App. 2004).

129. *Giles 2*, 152 P.3d at 441.

130. *Id.* at 441-42.

131. *See supra* note 72 and accompanying text. For a summary of the legislative history, *see* Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 806(b)(6)*, 80 NEB. L. REV. 891, 903-08 (2001).

> to, and did, procure the unavailability of the declarant as a witness.[132]

The advisory committee stated that the rule was meant "to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness."[133] Notably, the original title of the rule was altered from "waiver by misconduct" to "forfeiture by wrongdoing."[134]

The purpose of the rule was to prevent "abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[135] From this statement, it appears that broad equitable principles were the basis for the rule. However, the rule was actually proposed to "address the problem of witness tampering."[136] During drafting, some members were concerned that the rule would allow admission of "any prior statements made by the victim in a murder case,"[137] but "[t]he adoption of a specific intent requirement limited the Rule to witness tampering cases."[138]

IV. EFFECT OF *GILES*: FROM FORFEITURE TO WAIVER

The effect of the Supreme Court's decision in *Giles* is a move from the doctrine of *forfeiture* by wrongdoing to a *waiver* of the confrontation right by misconduct, thereby aligning it with other criminal procedure rights under the Confrontation Clause. This section begins with a discussion of the difference between the terms "forfeiture" and "waiver," then provides a brief overview of other rights under the Confrontation Clause and their waiver requirements, and ends with a comparison of a defendant's rights under the *Giles* decision with other confrontation rights.

A. Forfeiture Versus Waiver

The terms "forfeiture" and "waiver" are often substituted for one another, but there is a key difference.[139] This impacts forfeiture by wrongdoing, because the doctrine "reaches beyond waiver to forfeiture, where the loss of the right is tied to activity months or years before a trial is contemplated, when the consequences of the act cannot be foreseen."[140]

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132. FED. R. EVID. 804(b)(6).
133. FED. R. EVID. 804(b)(6) advisory committee's note.
134. *See* Flanagan, *supra* note 105, at 478-79. "[F]orfeiture better reflected the rationale of the Rule [and t]he courts had previously made a similar adjustment . . . ." *Id.* at 478.
135. FED. R. EVID. 804(b)(6) advisory committee's note (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).
136. Minutes of the Committee on Rules of Practice and Procedure, June 19, 1996, *available at* 1996 WL 936792, *24 (J.C.U.S.).
137. *Id.*
138. *See* Flanagan, *supra* note 105, at 477.
139. *Giles 2*, 152 P.3d at 443.
140. *See* Flanagan, *supra* note 105, at 527.

A waiver is defined as "an intentional relinquishment or abandonment of a known right or privilege."[141] Thus, the mental state of a defendant is at issue when determining waiver.[142] In criminal procedure, a waiver must usually be done knowingly, intelligently, and voluntarily.[143]

"In contrast to a waiver, a forfeiture occurs by operation of law, regardless of the state of mind of the defendant. Forfeiture is a consequence of another action performed by the defendant which may have unforeseen and unintended consequences for the affected individual."[144]

Furthermore, forfeiture by wrongdoing is a broad concept that encompasses waiver: "Waiver . . . *is merely one means by which a forfeiture may occur*. Some rights may be forfeited by means short of waiver . . . ."[145] Thus, it is possible for a defendant to both forfeit and waive his rights by the same actions.[146]

B. Waiver of Confrontation Rights in Other Criminal Contexts

A defendant's confrontation right flows from the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[147] At its foundation, it requires the presence of both the defendant and the witness; if one of those two parties is absent, then the confrontation right is implicated.[148] There are three typical situations in which one of those two parties is absent, thereby implicating the confrontation right: when a defendant is concealing the location of a witness, voluntarily absenting himself from the trial, or removed from the courtroom due to his misbehavior.[149] These three "major confrontation cases all satisfy the knowing waiver of rights rationale because they all involve direct decisions by the defendant . . . The immediate and inevitable consequence of the knowing waiver of rights theory [is] the loss of a Sixth Amendment right."[150]

In the first instance, when a defendant conceals the location of the witness, the touted case is *Reynolds*.[151] If you will recall, Reynolds refused to disclose the whereabouts of his alleged second wife when presented with a subpoena for her appearance as a witness in his trial for bigamy.[152] By Reynolds' direct actions in

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141. *Id.* at 473 (quoting Johnson v. Zerbst, 304 U.S. 458 (1938)).
142. *Id.* at 474.
143. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966).
144. *See* Flanagan, *supra* note 105, at 474.
145. *Giles 2*, 152 P.3d at 442 (citations omitted) (quoting Freytag v. Commissioner, 501 U.S. 868, 894-95, n.2).
146. *See infra* note 153 and accompanying text.
147. *See supra* note 102 and accompanying text.
148. "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (citing Lewis v. United States, 146 U.S. 370 (1892)).
149. *See* Flanagan, *supra* note 105, at 526-27.
150. *Id.*
151. *See supra* notes 62-69, 120-23 and accompanying text.
152. *See supra* note 64-66 and accompanying text.

keeping the witness away, he not only forfeited his confrontation rights by wrongdoing, but in turn knowingly and voluntarily waived his rights.[153]

Secondly, a defendant may voluntarily choose to be absent from trial. In *Diaz v. United States*,[154] the defendant was on trial for homicide.[155] During the trial the defendant was out on bail and voluntarily absented himself by sending a message to the court stating that the trial should proceed without him but with his counsel.[156] One of the defendant's arguments on appeal included that the court improperly proceeded in the defendant's absence because he could not waive his right to be present.[157] According to the Court:

> [T]he prevailing rule has been, that if, after the trial has begun in his presence, [a defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[158]

The Court also employed a policy argument, in that a defendant should not be able to "paralyze the proceedings of courts and juries" by not allowing a waiver of the right to be present when a defendant "escape[s] from prison[] or [absconds] from the jurisdiction while at large on bail."[159] Thus, a defendant may waive his confrontation right through a voluntary absence because a reasonable person could only conclude that such a choice would result in the consequence of not being present at trial.

Finally, a defendant may be removed from the courtroom due to his own disruptive behavior. In *Illinois v. Allen*,[160] the defendant refused counsel and was allowed to proceed *pro se*.[161] However, he refused to follow the judge's instructions, made abusive comments to the judge, and tore and threw papers in the courtroom.[162] The judge warned him that if his behavior continued he would be removed from the courtroom, but the defendant continued to proceed inappropriately.[163] The judge removed the defendant from the courtroom and ordered the trial to continue in his absence.[164] The defendant was allowed to return when he requested to be present and was given another warning that he needed to act appropriately.[165]

153. *See* Flanagan, *supra* note 105, at 527; *see also supra* notes 145-46 and accompanying text.
154. Diaz v. United States, 223 U.S. 442 (1912).
155. *Id.* at 444. The crime took place in the Philippines, so their laws were considered, but the Court also considered and examined U.S. law. *See id.* at 454-55.
156. *Id.*
157. *Id.* at 453.
158. *Id.* at 455.
159. *Id.* at 458.
160. Illinois v. Allen, 397 U.S. 337 (1970).
161. *Id.* at 339.
162. *Id.* at 339-40.
163. *Id.* at 340.
164. *Id.*
165. *Id.*

However, he interfered with the proceeding and was removed once again.[166] When the prosecution rested, the defendant was allowed to return to the courtroom when he promised to behave.[167] The defendant later alleged that his constitutional right to be present at trial had been violated.[168] The Court held that:

> [A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[169]

Here, the defendant knowingly, intelligently, and voluntarily waived his right to be present at trial because he proceeded with his disruptive actions despite his awareness of the consequences through the judge's warnings.

Through this synopsis of the three main avenues in which the confrontation right may be implicated, by the absence of either the witness or the defendant, we find that criminal procedure aspires for a knowing, intelligent, and voluntary waiver of the confrontation right. By adding an intent requirement to forfeiture by wrongdoing, the *Giles* court continues this aspiration. The *Giles* decision is an attempt to align the forfeiture doctrine with the waiver requirements when other confrontation rights are at issue.

V. CONCLUSION

Brenda is dead.[170] She has been silenced and cannot testify at the trial of her killer. After *Giles*, there are three options for her voice to be heard at trial: 1) her statements must be classified as non-testimonial,[171] 2) Dwayne must have had the particular intent to prevent her from testifying when he killed her,[172] or 3) Dwayne must have had intent to isolate Brenda and prevent her from reporting domestic violence when the prior statements were made.[173]

By deciding *Giles* and requiring the particular intent of a defendant to prevent the witness from testifying, the Court has aligned the doctrine of forfeiture by wrongdoing with other criminal waivers of confrontation rights. This alignment provides an extra measure of protection to defendants, but further silences victims.

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166. *Id.* at 341.
167. Allen, 397 U.S. at 341. Appointed counsel conducted his defense. *Id.*
168. *Id.* at 339.
169. *Id.* at 343. The Court also found three specific constitutional ways for trial courts to deal with similar defendants: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 344. Regarding the first option, duct tape was recently used to gag a disruptive defendant. *Judge Orders Defendant's Mouth Taped Shut*, April 21, 2009, http://www.msnbc.msn.com/id/30335202/?GT1=43001.
170. *See supra* note 11 and accompanying text.
171. *See supra* notes 78-79 and accompanying text.
172. *See supra* note 47 and accompanying text.
173. *See supra* notes 74-75 and accompanying text.